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 2 DAVID J. COOPER, CSB NO. 47615 –
 3 LISA HOLDER, CSB NO. 217752
 4 CONNIE M. PARKER, CSB NO. 254484
 5 KLEIN, DENATALE, GOLDNER,
 COOPER, ROSENLIEB & KIMBALL, LLP
 6 4550 California Avenue, Second Floor
 Bakersfield, California 93309
 7 Telephone: (661) 395-1000
 Fax: (661) 326-0418
 E-mail: lholder@kleinlaw.com

8 Attorneys for Jeffrey Vetter, Chapter 7 Trustee

9
 10 **UNITED STATES BANKRUPTCY COURT**
 11 **EASTERN DISTRICT OF CALIFORNIA**

12 In re:
 13 SALMA H. AGHA,
 14 Debtor.

15 Case No. 10-16183-A-7
 16 Chapter 7
 17 DC No. [none identified in moving
 documents]

18 **CHAPTER 7 TRUSTEE JEFFREY
 19 VETTER'S AND HIS ATTORNEYS'
 20 OPPOSITION TO DEBTOR'S
 21 REQUEST TO BRING LEGAL
 22 ACTION AGAINST TRUSTEE AND
 23 HIS COUNSEL**

24 Date: February 5, 2015
 25 Time: 9:00 a.m.
 26 Place: U.S. Bankruptcy Court
 1300 18th Street, Ste. A
 Bakersfield, California
 27 Judge: Hon. W. Richard Lee

28 Chapter 7 Trustee, Jeffrey Vetter ("Trustee"), and his court-approved attorneys, Klein,
 DeNatale, Goldner, Cooper, Rosenlieb & Kimball, LLP ("Klein, DeNatale")¹, oppose Debtor's
 request to bring legal action against Trustee and his counsel,² based on the following:

29 / / /

30 ¹ All Klein, DeNatale attorneys, including Lisa Holder and Barry L. Goldner, hereby oppose
 31 Debtor's motion to bring legal action against Trustee and his counsel. Debtor has named
 32 attorneys Holder and Goldner as co-defendants in the action, *Agha-Khan, M.D. v. The United*
33 States of America, et. al., United States Court Central District of California Case No. CV 14-
34 03490 FMO.

35 ² Debtor's motion is titled, *Motion Re: Resubmission of Debtor-Plaintiff's Motion That Was*
Fraudulently Misfiled and Intentionally Kept Hidden for One Month Titled: "Request to Bring
Legal Action Against Trustee Vetter and Trustee's Counsel." See Doc. 202.

KLEIN, DENATALE, GOLDNER,
COOPER, ROSENBLIEB & KIMBALL, LLP
4550 CALIFORNIA AVENUE, SECOND FLOOR
BAKERSFIELD, CALIFORNIA 93309

1 **I. INTRODUCTION**

2 Debtor seeks bankruptcy court permission to bring legal action against Trustee and his
 3 court-approved attorneys. Debtor's request is late in that Debtor is already improperly
 4 prosecuting an action against Trustee and his counsel without leave of the bankruptcy court:
 5 *Agha-Khan, M.D. v. United States of America, et. al.*, United States Court Central District of
 6 California Case No. CV 14-03490 FMO; see also *Declaration of Connie M. Parker in Support*
 7 *of Chapter 7 Trustee Jeffrey Vetter's Opposition to Debtor's Motion to Disqualify Klein,*
 8 *DeNatale, Goldner*, filed and served concurrently herewith.

9 Nonetheless, Trustee's and his attorneys' actions, are absolutely privileged as they all
 10 derive from court-approved actions in the administration of Debtor's estate. Debtor cannot
 11 bring action against Trustee and his attorneys. The court should deny Debtor's motion with
 12 prejudice because Debtor has not and cannot set forth a *prima facie* case.

13 **II. BACKGROUND**

14 **A. Initial Administration of Debtor's Chapter 7 Proceeding**

15 On May 30, 2010, Debtor, under the name "Salma H. Agha," filed a voluntary petition
 16 for relief under Chapter 7. Doc. 1. The U.S. Trustee's Office appointed Jeffrey M. Vetter as
 17 Trustee on June 1, 2010. Doc. 2.

18 On July 13, 2010, Debtor filed her Schedules. Doc. 28. Under Schedule B, No. 13,
 19 Debtor scheduled stock in a corporation identified as Aris, Inc., but did not schedule
 20 membership interests in any limited liability companies, such as Vodka From Around the
 21 World, LLC. Doc. 28.

22 Under Schedule B, No. 21, Debtor scheduled a potential claim against Tenet Health
 23 Corp. and potential lawsuit against SS Nite Life, but nothing about a claim against Bruce
 24 Breitman and/or BBG, Ltd.. Doc. 28. See also *Declaration of Jeffrey M. Vetter in Support of*
Motion for Order Authorizing Sale and Assignment of State Court Litigation Claim and LLC
Interest to BBG, Ltd, filed on November 27, 2012, Doc. 80, ¶ 6.

25 Trustee administered Debtor's Chapter 7 proceeding as a no-asset case. Doc. 34. On
 26 September 23, 2010, the court entered Debtor's discharge. Doc. 51. The court entered a final

1 decree on January 7, 2011. Doc. 66.

2 **B. Reopening and Subsequent Administration of Debtor's Chapter 7 Proceeding**

3 On October 14, 2011, Debtor filed the following Superior Court lawsuit: *Vodka From*
 4 *Around the World, LLC and Salma H. Agha-Khan v. Bruce M. Brietman and BBG, Ltd.*, San
 5 Francisco County Superior Court Case No. CGC-11-515095 (the “San Francisco lawsuit”).
 6 See Exhibit “A” to *Exhibits in Support of Motion for Order Authorizing Sale and Assignment of*
 7 *State Court Litigation Claim and LLC Interest to BBG, Ltd.*, filed on November 27, 2012, Doc.
 8 81. The October 2011, lawsuit alleged damages from a 2009 transaction involving Debtor’s
 9 purchase of a nightclub. *Id.*

10 In September 2012, Trustee learned of the San Francisco lawsuit after the attorneys for
 11 the defendants, Mr. Brietman and BBG, Ltd., contacted Trustee to offer a settlement. See
 12 *Application for Order Authorizing Trustee to Employ Attorneys Effective September 13, 2012*,
 13 filed November 8, 2012, Doc. 72, ¶s 3 – 4. Trustee contacted the United States Trustee and
 14 requested that the Chapter 7 case be reopened to administer undisclosed assets. *Id.* at ¶ 5.

15 On September 13, 2012, the U.S. Trustee moved to reopen Debtor’s case. Doc. 68 – 69.
 16 The court reopened the case on September 18, 2012. Doc. 70. Jeffrey M. Vetter was appointed
 17 Chapter 7 Trustee on September 19, 2012. Doc. 71. The court approved employment of Klein,
 18 DeNatale as Trustee’s attorneys. Doc. 77 and 109.

19 On November 27, 2012, by Docket Control No. KDG-2, Trustee by counsel, noticed a
 20 December 18, 2012 hearing on his *Motion for Order Authorizing Sale and Assignment of State*
 21 *Court Litigation Claim and LLC Interest to BBG, Ltd.* Doc. 79 – 82 Per the notice, Trustee
 22 sought court approval to sell the rights to the San Francisco lawsuit and Vodka From Around
 23 the World, LLC to BBG, Ltd., for \$15,000.00, subject to higher and better bids. Doc. 79.

24 The court’s tentative ruling was to grant the motion to sell, but continued the hearing to
 25 January 23, 2013, due to a conflict issue and to allow for a briefing schedule on the motion to
 26 sell. Doc. 84. As set forth in the *Supplemental Declaration of Lisa Holder Regarding Order*
 27 *Authorizing Trustee to Employ Attorneys Effective September 13, 2012*, filed on January 2,
 28 2013 (Doc. 97), Ms. Holder of Klein, DeNatale had discovered that Klein, DeNatale previously

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 4550 CALIFORNIA AVENUE, SECOND FLOOR
 BAKERSFIELD, CALIFORNIA 93309

1 represented Debtor in an unrelated construction defect lawsuit in 2003/2004. Ms. Holder
 2 disclosed this potential conflict and declared that no conflict-of-interest existed by Klein,
 3 DeNatale's prior representation and the court agreed. See Doc. 97 and 109.

4 After allowing for written and oral opposition from Debtor's counsel, and amicus
 5 briefing from the proposed buyer's counsel, the court approved the sale of the rights to the San
 6 Francisco lawsuit and Vodka From Around the World, LLC to BBG, Ltd. for \$15,000,00.
 7 Doc. 110, 111; See also Reporter's Transcript from January 23, 2013 hearing, filed February
 8 18, 2013, Doc. 112.

9 Without explanation or supporting legal authority, Debtor alleges the reopening of her
 10 bankruptcy and subsequent sale of assets was purportedly "illegal" and "fraudulent." On that
 11 premise, but without any factual support or legal authority, Debtor wants the bankruptcy court
 12 to grant leave to sue Trustee and his counsel and/or retroactively sanction the Central District
 13 lawsuit Debtor already started.

14 III. LEGAL ANALYSIS

15 A. Trustee and His Attorneys' Actions Are Absolutely Privileged.

16 11 U.S.C. § 323(b) provides that a trustee has capacity to be sued. However, under the
 17 "Barton doctrine," a claimant must obtain leave of the bankruptcy court before commencing
 18 suit against the trustee and/or his attorneys; otherwise the forum court lacks subject matter
 19 jurisdiction. *Barton v. Barbour*, 104 U.S. 126, 136-137 (1881); *In re Crown Vantage, Inc.*, 421
 20 F.3d 963, 970 (9th Cir. 2005).

21 Before leave to sue a bankruptcy trustee may be obtained, claimant must be able to
 22 plead the elements of a prima facie case against the trustee. *In re Kashani*, 190 B.R. 875, 883,
 23 885 (9th Cir. BAP 1995).

24 Because bankruptcy trustees serve an important function as officers of the court, they
 25 enjoy limited personal immunity when operating pursuant to their authority and enjoy absolute
 26 immunity if operating pursuant to a court order. *In re Kashani, supra*, 190 B.R. at 883; *In re*
 27 *Weisser Eyecare, Inc.*, 245 B.R. 844, 848 (Bkrtcy. N.D.Ill. 2000). A bankruptcy trustee cannot
 28 be held personally liable unless he acted outside the scope of his authority as trustee that is

KLEIN, DENATALE, GOLDNER,
 COOPER, ROSENBLER & KIMBALL, LLP
 4550 CALIFORNIA AVENUE, SECOND FLOOR
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1 "ultra vires," or breached a fiduciary duty he owed as the bankruptcy trustee to some claimant.

2 *Id.*

3 Proper authority of a Chapter 7 bankruptcy trustee is defined by his duties and
 4 responsibilities under the Bankruptcy Code. 11 U.S.C. §§ 363, 704; *In re Weisser Eyecare,*
 5 *Inc., supra*, 245 B.R. at 848. A bankruptcy trustee is required to convert an estate claim into
 6 money. 11 U.S.C. § 704(a)(1); *In re Weisser Eyecare, Inc., supra*, 245 B.R. at 849, 851.

7 Ironically, what Debtor protests is actually Trustee's compliance with 11 U.S.C. §
 8 704(a)(1). On January 23, 2013, by noticed motion, Trustee liquidated the estate's rights to the
 9 limited liability company, Vodka From Around the World, LLC and its rights to a contingent,
 10 unliquidated claim per the lawsuit, *Vodka From Around the World, LLC and Salma H. Agha-*
 11 *Khan v. Breitman, et. al.*, San Francisco County Superior Court Case No. CGC-11-515095. All
 12 of Trustee's and his attorneys' actions leading to the liquidation of the estate property were
 13 sanctioned by bankruptcy court orders. Therefore, Trustee and his counsel receive absolute
 14 immunity.

15 **B. Trustee and His Counsel Acted Within Statutory Authority.**

16 Filing of a bankruptcy petition creates a bankruptcy estate comprising essentially all
 17 property of the debtor. 11 U.S.C. § 541(a); *In re Nagy*, 432 B.R. 564, 568 (Bkrtcy.M.D.La.
 18 2010). The Chapter 7 trustee becomes the representative of the bankruptcy estate upon his
 19 appointment and qualification and generally he alone can sell estate property, providing the
 20 bankruptcy court approved the sale. 11 U.S.C. §§ 323(a), 363(b), *In re Nagy, supra*, 432 B.R. at
 21 568.

22 The courts have established certain standards and instructions whereby the trustees can
 23 protect themselves by complying with these standards, and thus, gain judicial immunity. *In re*
 24 *Kashani, supra*, 190 B.R. at 884. "Those instructions include: the trustee should give notice to
 25 the debtor and obtain prior court approval of the proposed act; the disclosure by the trustee to
 26 the court in furtherance of the requested approval must be candid; and the act must be within
 27 the trustee's official duties." *Id.*

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KLEIN, DENATALE, GOLDNER,
 COOPER, ROSENTHAL & KIMBALL, LLP
 4550 CALIFORNIA AVENUE, SECOND FLOOR
 BAKERSFIELD, CALIFORNIA 93309

1 While Debtor complaints that Trustee “illegally reopened” her bankruptcy proceeding,
 2 the U.S. Trustee’s Office, not Trustee or his counsel, reopened her bankruptcy proceeding, as
 3 documented in the court record:

- 4 • U.S. Trustee’s Ex Parte Motion to Reopen Case, filed on September 13, 2012,
 5 Doc. 68;
- 6 • Certificate of Service regarding U.S. Trustee’s Ex Parte Motion to Reopen Case
 7 and Proposed Order, filed on September 13, 2012, Doc. 69;
- 8 • Order Granting U.S. Trustee’s Ex Parte Motion to Reopen Case, filed on
 9 September 18, 2012, Doc. 70.

10 11 U.S.C. §350(b) provides that a bankruptcy case may be reopened to administer assets
 11 or for other cause. The U.S. Trustee moved to reopen on the basis that Debtor omitted assets in
 12 her bankruptcy schedules including an interest in a limited liability company. See Doc. 68.

13 Debtor also complaints that Trustee “illegally” employed counsel, but the record shows
 14 that Trustee employed counsel by notice and with court approval:

- 15 • Application for Order Authorizing to Trustee to Employ Attorneys Effective
 16 September 13, 2012, filed on November 8, 2012, Doc. 72;
- 17 • Declaration of Lisa Holder regarding Application for Order Authorizing
 18 Trustee to Employ Attorneys Effective September 13, 2012, filed on
 19 November 8, 2012, Doc. 73;
- 20 • Proof of Service for Application for Order Authorizing to Trustee to Employ
 21 Attorneys Effective September 13, 2012, Declaration of Lisa Holder
 22 regarding Application for Order Authorizing to Trustee to Employ Attorneys
 23 Effective September 13, 2012, filed on November 8, 2012 and Proposed
 24 Order, filed on November 8, 2012, Doc. 74;
- 25 • Order Authorizing Trustee to Employ Attorneys Effective September 13,
 26 2012, filed on November 21, 2012, Doc. 77;
- 27 • Notice of Hearing Regarding Order Authorizing Trustee to Employ
 28 Attorneys Effective September 13, 2012, filed on January 2, 2013, Doc. 96;

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 COOPER, ROSENBLIEB & KIMBALL, LLP
 4550 CALIFORNIA AVENUE, SECOND FLOOR
 BAKERSFIELD, CALIFORNIA 93309

- 1 • Supplemental Declaration of Lisa Holder Regarding Order Authorizing
- 2 Trustee to Employ Attorneys Effective September 13, 2012, filed on January
- 3 2, 2013; Doc. 97;
- 4 • Proof of Service for Notice of Hearing Regarding Order Authorizing Trustee
- 5 to Employ Attorneys Effective September 13, 2012 and Supplemental
- 6 Declaration of Lisa Holder Regarding Order Authorizing Trustee to Employ
- 7 Attorneys Effective September 13, 2012, filed on January 2, 2012, Doc. 98;
- 8 • Civil Minutes from January 23, 2013 Hearing on Motion to Employ, filed on
- 9 January 23, 2013, Doc. 109.

10 Debtor complains that the court approved the employment of Klein, DeNatale, *nunc pro*
 11 *tunc* to September 13, 2012. The court has discretion to approve retroactive employment of
 12 professionals under extraordinary circumstances. *In re Crest Mirror and Door Co., Inc.*, 57
 13 B.R. 830, 832 (9th Cir. BAP 1986). In this case, Trustee sought employment of Klein,
 14 DeNatale retroactive to September 13, 2012, because Klein, DeNatale had begun providing
 15 services to Trustee by September 13, 2012, by reviewing an undisclosed lawsuit in San
 16 Francisco Superior Court, Debtor's schedules and analyzing the issue of abandonment under 11
 17 U.S.C. § 554(c). See Doc. 72, ¶ 12.

18 The event that prompted reopening of Debtor's case was Trustee's discovery that
 19 Debtor, and a limited liability company controlled by Debtor, had filed a lawsuit in San
 20 Francisco Superior Court against Mr. Breitman and BBG, Ltd., but these assets were not part of
 21 Debtor's Schedule B. The defense attorney in that lawsuit contacted Trustee to offer
 22 settlement. See Doc. 72, ¶s 3 through 5. Thereafter, the U.S. Trustee reopened the case and
 23 Trustee was appointed to administer the estate. Doc. 70, 71.

24 While Debtor complains that Trustee, "illegal stole" her property, the facts are that
 25 Trustee sold the estate's right to a contingent lawsuit and limited liability by noticed motion
 26 approved by the bankruptcy court. In approving the sale, the court ruled that the rights to the
 27 San Francisco lawsuit and Vodka From Around the World, LLC were not abandoned as part of
 28 the closing of bankruptcy proceeding pursuant to 11 U.S.C. § 554(c)(1), because this property

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 COOPER, ROSENBLIEF & KIMBALL, LLP
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1 was not scheduled. Debtor never perfected any appeal of the final order approving the sale.
 2 Debtor impermissibly is seeking a second bite of the apple and attempting to re-litigate the sale
 3 through her quest to sue Trustee and his counsel.

4 **C. Trustee's and His Counsel's Acts Are Absolutely Privileged Under California**
 5 **Civil Code § 47(b)(2).**

6 A publication made in a judicial proceeding is absolutely privileged pursuant to
 7 California Civil Code section 47(b)(2). In *Silberg v. Anderson*, 50 Cal.3d 205, 215 (1990) the
 8 California Supreme Court found the litigation privilege to apply to statements made “in the
 9 context of a judicial proceeding, [that] were logically related to the action, played an integral
 10 role in the proceeding, and were made by one of the participants about an authorized
 11 participant.” The principal purpose of California’s litigation privilege is to afford litigants and
 12 witnesses the upmost freedom of access to the courts without fear of being harassed
 13 subsequently by derivative tort actions. *Visto Corp. v. Sproquit Technologies, Inc.*, 360
 14 F.Supp.2d 1064, 1068 (N.D. Cal. 2005). The litigation privilege is absolute, not qualified,
 15 even when prelitigation communications are implicated. *Id.* at footnote 2.

16 Here, the Debtor is suing and/or seeks to sue Trustee and his counsel for statements
 17 made in conjunction with the court’s reopening of the case, employment of Klein, DeNatale
 18 and motion to sell. Debtor does not complain of any wrongdoing independent of Trustee’s and
 19 his attorneys’ actions in appearing in the bankruptcy proceeding. Since their acts are absolutely
 20 privileged under Civil Code section 47, the court should deny Debtor’s motion with prejudice.

21 **D. No Leave To Sue Trustee and/or His Counsel Was Ever Provided by the U.S.**
 22 **Trustee’s Office**

23 Debtor relies on an October 23, 2013 from the U.S. Trustee’s Office as a basis for leave
 24 to sue Trustee and his counsel. However, the letter gives no such authorization pursuant to the
 25 *Barton* doctrine. Rather, the U.S. Trustee’s office suggested Debtor seek counsel from her
 26 attorney to determine whether she has any rights or remedies to pursue.

27 / / /
 28 / / /

1 **IV. CONCLUSION**

2 For the reasons provided in this Opposition, Trustee and Klein, DeNatale pray: (1) the
3 court deny Debtor's request to bring legal action against Trustee and his counsel with
4 prejudice; and (2) for all other relief deemed just and proper.

5 Dated: January 22, 2015

KLEIN, DeNATALE, GOLDNER,
COOPER, ROSENIEB & KIMBALL, LLP

7 By Connie M. Parker

8 CONNIE M. PARKER, ESQ.

9 Attorneys for Jeffrey Vetter, Chapter 7 Trustee

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KLEIN, DENATALE, GOLDNER,
COOPER, ROSENIEB & KIMBALL, LLP
4550 CALIFORNIA AVENUE, SECOND FLOOR
BAKERSFIELD, CALIFORNIA 93309